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NTSB Order No. EA-3670

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 25th day of August, 1992

THOMAS C. RICHARDS, Administrator, Federal Aviation Administration, Complainant, v. EDWARD A. HERSON, Respondent.	Docket SE-12634

OPINION AND ORDER

The respondent, pro se, has appealed from the oral initial decision Administrative Law Judge Patrick G. Geraghty issued in this proceeding on July 17, 1992, at the conclusion of an evidentiary hearing.[1] By that decision, the law judge affirmed an emergency order of the Administrator revoking respondent's student pilot certificate for his alleged violations of sections

[1]An excerpt from the hearing transcript containing the initial decision is attached.

61.3(a) and (c) of the Federal Aviation Regulations (FAR, 14 CFR Part 61) and Section 610(a)(2) of the Federal Aviation Act of 1958, as amended (49 USC 1430(a)(2)).[2] For the reasons discussed below, we will deny the appeal.

In the June 26, 1992 emergency order of revocation, which served as the complaint in this action, the following allegations, among others, are made:

> 1. By Emergency Order of Revocation dated August 6, 1990, issued by the Administrator of the Federal Aviation Administration (FAA), the Student Pilot Certificate then held by you was revoked for violations of the Federal Aviation Regulations set forth therein, which included student pilot-passenger-carrying operations, and unauthorized operation of

[2]FAR sections 61.3(a) and (c) and Section 610(a)(2) of the Act provide, in relevant part, as follows:

"§61.3 **Requirement for certificates, ratings, and authorizations.**

(a) Pilot certificate. No person may act as pilot in command or in any other capacity as a required pilot flight crewmember of a civil aircraft of United States registry unless he has in his personal possession a current pilot certificate issued to him under this part....

* * * * *

(c) Medical certificate. Except for free balloon pilots piloting balloons and glider pilots piloting gliders, no person may act as pilot in command or in any other capacity as a required pilot flight crewmember of an aircraft under a certificate issued to him under this part, unless he has in his personal possession an appropriate current medical certificate issued under part 67 of this chapter...."

"Sec. 610(a) It shall be unlawful--

* * * * *

(2) For any person to serve in any capacity as an airman in connection with any civil aircraft, aircraft engine, propeller or appliance used or intended for use, in air commerce without an airman certificate authorizing him to serve in such capacity, or in violation of any term, condition, or limitation thereof, or in violation of any order, rule, or regulation issued under this title...."

aircraft in acrobatic flight.

2. By Consent Judgment dated November 4, 1991, issued by the United States District Court for the District of Colorado, as result of your operation of aircraft on September 30, 1990, and on two occasions on November 25, 1990, as pilot-in-command at a time which you did not possess an Airman (pilot) Certificate or an Airman Medical Certificate, and in acrobatic flight, you were permanently enjoined from operating or piloting any aircraft until such time as you held an appropriate Airman (pilot) Certificate and a valid Airman Medical Certificate issued by the FAA under the rules and regulations of the FAA.

3. On or about April 11, 1992, you, as pilot-in-command, operated a civil aircraft on a flight in air commerce, carrying parachute jumpers as passengers, originating and terminating at the Frederick-Firestone Airstrip, Frederick, Colorado.

4. On or about April 25, 1992, you, as pilot-in-command, operated a civil aircraft on a flight in air commerce, carrying parachute jumpers as passengers, originating and terminating at the Frederick-Firestone Airstrip, Frederick, Colorado.

5. On or about May 9, 1992, you, as pilot-in-command, operated a civil aircraft on a flight in air commerce originating and terminating at the Frederick-Firestone Airstrip, Frederick, Colorado.

6. On the occasion of the flights set forth in paragraphs 3 through 5 above, you were not the holder of either a current airman (pilot) certificate or an appropriate, current airman medical certificate.[3]

[3]The complaint also alleged that the respondent was issued a Medical Certificate and Student Pilot Certificate (No. DD-0979165) on May 29, 1992. It is this certificate that the emergency order revokes.

The law judge concluded that the unlawful flights had occurred as alleged.

In support of his charges, the Administrator produced three skydiving students of respondent's who testified about one or more of the three flights in issue. As to the April flights, two of the witnesses indicated that they, while standing close by, had observed respondent and several jumpers enplane, with respondent assuming the pilot's seat and the others positioning themselves on the floor of the aircraft. They further observed respondent taxi to the runway, take off, and, after a short flight during which the jumpers exited the aircraft, return to the airport with no one else in the aircraft with him. As to the May flight, respondent was observed to be the only occupant of the aircraft when it taxied to the runway for takeoff and when it returned to hangar area after a brief flight.

Respondent, in rebuttal, established that the Administrator's witnesses were not in a position to see who was in fact at the controls of the aircraft once it left the hangar area, and he called two skydiving students who testified, consistent with his own testimony, that they had not seen him pilot the aircraft on the dates in question. One of his witnesses, moreover, testified that on one of the dates he had seen the "regular" pilot enplane after respondent had taxied the aircraft to the end of the runway, a location not observable from the hangar area. Respondent maintained, in effect, that it was

not uncommon for him to taxi the aircraft to the runway's end before the first operation of the day so that the pilot could walk the runway while inspecting it for damage, such as small animal created "potholes," or other problems.[4] He also maintained that the Administrator's witnesses must have been mistaken because they asserted that respondent was wearing his skydiving helmet while piloting the aircraft, whereas he would never do that because he would not be able to use the aircraft radio headset.[5]

The law judge, after thoroughly reviewing the parties' evidence in considerable detail, found the testimony of the Administrator's witnesses to be more credible and probative. While the respondent in his brief urges us to find that the law judge did not give adequate consideration to several factors that the respondent believes should have been dispositive in his favor, he has not demonstrated that the law judge gave insufficient weight to any matter on which there was testimony at the hearing, nor has he identified any factor which would warrant disturbing the law judge's ultimate conclusion, based in large

[4]Although respondent's evidence purported to explain how the Administrator's witnesses might erroneously believe that he had been the pilot because they had seen him taxi the aircraft from the hangar area, it did not explain how they could also be mistaken as to his being the pilot when he taxied back, alone, in the aircraft. No explanation was offered for the pilot to leave the aircraft after landing but before parking the aircraft at the hangar area.

[5]The Administrator counters with the observation that an unlicensed individual, especially one with respondent's violation history, would not likely be concerned with facilitating his ability to converse with air traffic control.

part on his credibility assessments of the various witnesses, that respondent had piloted the aircraft as alleged.[6] Respondent's disagreement with that conclusion rests, at least in part, on his mistaken belief that the Administrator could not prevail unless he produced a witness who had actually seen respondent fly the aircraft, rather than just taxi it. We agree with the Administrator that there was sufficient circumstantial proof for the law judge to find that respondent was the pilot of the aircraft both when the Administrator's witnesses could see him and when they could not.[7]

Last, we note that respondent, after the briefs had been filed, submitted affidavits from the two individuals who were employed by him as jump pilots on the dates in question in the complaint, but who could not, according to respondent, be located in time to make an appearance at the hearing.[8] Although the submissions appear to provide mostly cumulative rather than new information pertinent to the issues the law judge decided, we

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[6]As the Administrator points out in his reply brief, the existence of section 821.11 in the Board's Rules of Practice does not, as the respondent appears to believe, demonstrate that the law judge had erroneously advised the respondent that the hearing date could not be postponed. That rule, by its express terms, relates to extensions of time to file certain documents, not to continuances for hearings.

[7]We also agree with the Administrator that the respondent cannot now attack the credibility of the Administrator's witnesses by suggesting motives for bias for which there is no evidentiary support in the record.

[8]No certificate of service reflecting that copies of the affidavits were furnished to the Administrator was included, and the cover letter submitting them does not indicate whether the Administrator was served.

have not considered them in evaluating the respondent's objections to the initial decision, for the Board will not accept and review on appeal evidence that was not part of the record before the law judge.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied, and

2. The initial decision and the emergency order of revocation are affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.